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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1092

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

JAMES SHARP, JR.
105 North 23rd Street
P. O. Box 271
Monroe, Louisiana
Attorney for Appellants

Franklin Press, Inc. — *Baton Rouge, La.*

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No.

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Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the District Court for Ouachita Parish, Louisiana dismissing appellants petition (Appendix, "A," infra

p. 15) is not reported. The opinion of the Court of Appeal, Second Circuit (Appendix, "B," infra pp. 17-23) is reported at 210 So. 2d 602. The opinion of the Supreme Court of Louisiana on appellants petition for Writ of Review (Appendix, "C," infra p. 24) is not reported.

JURISDICTION

On November 27, 1968 the Fourth District Court for Ouachita Parish, Louisiana, dismissed appellants petition seeking to have the will of Joe Wilson declared null and void on the grounds that under Code of Civil Procedure Article 681 appellants had not the requisite interest to test the validity of the will. The trial court also refused appellants motion for leave to amend. The Court of Appeals, Second Circuit, affirmed the rulings of the trial court on April 30, 1968 and refused an application for rehearing on June 4, 1968. The Supreme Court of Louisiana denied appellants petition for Writ of Review on October 3, 1968. A notice of appeal to this court was filed in the trial court on December 18, 1968 and in the Supreme Court of Louisiana on December 16, 1968. By order of this court the time for docketing this appeal was extended to and including March 2, 1969. We claim jurisdiction is conferred upon this court under Title 28, United States Code, Section 1257 (2 & 3); Federal Code Annotated, Title 28, Section 1257 (2 & 3).

QUESTIONS PRESENTED

Samuel Emanuel is the duly qualified Testamentary Executor of the Succession of Irma Turner Wilson pursuant to the terms and provisions of her last will and testament. He is also a legatee under the will as well as Mary Stewart Emanuel. After the will was probated but before Samuel

Emanuel qualified as executor, Joe Wilson the surviving spouse of Irma Turner Wilson filed a petition claiming that her will was null and void. Joe Wilson died during the pendency of the proceedings in the Succession of Irma Turner Wilson and left a last will and testament naming Harold Chapple his Testamentary Executor. No trial having been had on the will of Irma Turner Wilson, Samuel Emanuel filed a petition in these proceedings claiming that the will of Joe Wilson was null and void. The will of Joe Wilson bequeathed to Harold Chapple the property he intended to inherit from his wife Irma Turner Wilson, the same property that was bequeathed to appellants in the will of Irma Turner Wilson. Appellants petition was dismissed at his cost. The questions presented are:

1. Whether or not Code of Civil Procedure Article 681 would bar appellants from testing the validity of the will of Joe Wilson, which will of Joe Wilson attempts to dispose of property that appellants would inherit under the will of Irma Turner Wilson in the absence of any will of Joe Wilson and if so whether or not said Article 681 is unconstitutional for reason of denying appellants equal protection of law and depriving them of their property without due process of law.

2. Whether or not Code of Civil Procedure Article 3091 applies to testamentary executors and succession administrators alike when a petition for notice has been filed pursuant to Code of Civil Procedure Article 3091 and if so what is the status of the succession representative who has failed to comply with the article so as to cause prejudice to interested parties.

3. Whether or not the motion for leave to amend should have been permitted by the trial court.

4. Whether or not a testamentary executor must defend at his cost attacks against the estate he represents pursuant to the will of decedent.

STATEMENT

Joe Wilson died during the pendency of his proceedings wherein he attacked the will of Irma Turner Wilson, leaving a document purporting to be his last will and testament wherein he named Harold Chapple his Testamentary Executor and universal legatee. On September 25, 1967 Samuel Emanuel filed a petition for notice of any application for appointment as administrator in the Succession of Joe Wilson, said petition being filed under probate number 78,866 on the docket of the Fourth District Court for Ouachita Parish, Louisiana. The next day September 26, 1967 Harold Chapple caused the will of Joe Wilson to be probated and had himself qualified as Testamentary Executor of the Succession of Joe Wilson filed on said date but failed to give notice of his application to be so appointed as required by law. Joe Wilson died on September 20, 1967 as shown in these proceedings and therefore ten (10) days had not elapsed since his death when Harold Chapple qualified as Testamentary Executor. No inventory of the property alleged to belong to decedent's estate was ordered taken by the court and none was filed in these proceedings. After qualifying as Testamentary Executor under the purported will of Joe Wilson, Harold Chapple caused himself to be substituted as party plaintiff in lieu of Joe Wilson in the Succession of Irma Turner Wilson, Probate Number 76,119 on the docket of the Fourth District Court for Ouachita Parish, Louisiana, and continued the attack upon the will of the said Irma Turner Wilson wherein Samuel Emanuel was named Testamentary Executor.

On October 4, 1967 Samuel Emanuel in defense of the succession he represented filed a petition individually and as Testamentary Executor and residuary legatee of the Succession of Irma Turner Wilson in these proceedings seeking to annul the testament of Joe Wilson. At this time Samuel Emanuel had not been confirmed as Testamentary Executor of the Succession of Irma Turner Wilson even though he was qualified as provided by law, the Trial Court having refused to qualify him as such forthwith. The basis of one of his attacks on the will of Joe Wilson was a motion to remove Harold Chapple as executor of the Succession of Joe Wilson for the reasons stated therein. He further attacked the will of Joe Wilson direct and by a petition alleging that said will was null and void for the several reasons contained in his petition. The Trial Court denied motion to remove Harold Chapple as Testamentary Executor of the Succession of Joe Wilson and further sustained an exception of no cause and no right of action to his petition.

Samuel Emanuel filed a motion for leave to amend his petition attacking the will of Joe Wilson, which motion was denied. Judgment was entered dismissing appellants petition and assessing Samuel Emanuel individually with all cost of these proceedings.

THE QUESTIONS ARE SUBSTANTIAL

1. There are no cases found decided by the Louisiana Courts substantially like this one. In view of the fact the will in this case seeks to dispose of property that belongs to another succession (Succession of Irma Turner Wilson), which appellants in these proceedings will inherit under the will of Irma Turner Wilson were it not for the will in these pro-

ceedings. The trial court in his reasons for judgment on page fifty-two (52) of the record states: "Nowhere in plaintiffs' petition do they allege that they are heirs of Joe Wilson. Should the will of Joe Wilson be declared null and void, the property owned by Joe Wilson could not be inherited by plaintiffs and the fact that they state that the will of Joe Wilson disposed of property belonging to the Succession of Irma Turner Wilson, contrary to the interest of petitioners, does not give them or state that it gives them an interest in the Succession of Joe Wilson." The ruling of the trial court was based on an interpretation of Code of Civil Procedure Article 681 (Appendix "D" p. 25). Joe Wilson claims that Irma Turner Wilson left no descendants, ascendants, collateral relations or natural child or children by her duly acknowledged and that he would inherit her estate under Civil Code Article 924 (Appendix "E" p. 26). The law review commentaries under this article explain two (2) important points. (1) Article 924 pertains only to separate property because under Article 915 the surviving spouse inherits the community property as a regular heir and immediately after the descendants (This inheritance is in concurrence with a surviving parent or parents). (2) There is nothing to prevent either spouse from giving by donation inter vivos or mortis causa any or all of his disposable portion. Joe Wilson seeks to declare the will of Irma Turner Wilson null and void because he would not inherit her separate estate in the absence of any such will. We wish to make it clear that Joe Wilson died on September 20, 1967, as shown by affidavit on page nine (9) of the record. At the time of his death there had been no trial on his petition seeking to declare the will of Irma Turner Wilson null and void. The judgment of the court was finally rendered on the 7th day of February, 1968 (Appendix "E" p. 26). Joe Wilson left no ascendants, de-

scendants, collateral relations or natural child or children duly acknowledged. But for his will there could be no substitution of party plaintiff in the Succession of Irma Turner Wilson. Appellants herein claim the will of Joe Wilson is an absolute nullity as shown in our petition on page nineteen (19) of the record and our supplemental and amending petition on page twenty-four (24) of the record. This succession and the Succession of Irma Turner Wilson was a situation wherein it appeared that the one who obtained the judgment first would be the successful party. Both cases were handled by the same court and appellants herein fought for survival but were unable to get a hearing on the validity of the will of Joe Wilson. One fact is clear and that is the will of Joe Wilson is attacked for nine (9) different reasons, see page twenty (20) of the record. The will of Irma Truner Wilson was attacked solely on the basis of form and no fraud or ill practice is alleged or proved, see *Succession of Irma Turner Wilson*, 213 So. 2d 776.

The Louisiana Courts have held that appellants herein had not the requisite interest to test the will of Joe Wilson under Article 681 of the Code of Civil Procedure. We did call to the attention of the courts Article 685 of the Louisiana Code of Civil Procedure which reads as follows:

> Article 685.
>
> Except as otherwise provided by law, the succession representative appointed by a court of this State is the proper plaintiff to sue to enforce a right of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or represented in the State or not, need not be joined as parties, whether the action is personal, real or mixed.

An executor may prosecute to its final termination, an action instituted by the testator to annul a donation inter vivos made by him, *Eskridge v. Farrar*, 1878, 30 La. Ann. 718. It would appear then that an executor might attack a will as null and void pursuant to which an attack is made upon the estate which he represents. In this case Samuel Emanuel is attempting to represent the succession in his capacity as testamentary executor and also to defend his individual interest. It is clear as stated in *Gurley v. City of New Orleans*, 1909, 124 La. 390, 50 So. 411, that a testamentary executor is the proper person to represent the succession. It further appears that when there is a pecuniary interest involved, said interest is sufficient to justify an action on behalf of said interested person. The exception referred to in the first clause of Article 681 avoids a conflict between it and Articles 683, 684, 692 through 695 and 700. Under Article 685 it would appear that a succession representative would be the proper party to enforce through the courts all rights of the succession whether or not they be personal, real or mixed. This in our judgment would include the suit seeking to declare a will null and void, which will is the basis of the authority for an attack upon property belonging to the estate or succession represented by an executor.

2. Samuel Emanuel filed a petition in these proceedings for notice of application for appointment as administrator pursuant to Article 3091 of the Louisiana Code of Civil Procedure (Appendix "G" p. 29). The petition for notice begins on page five (5) of the record. Harold Chapple failed and refused to give the required notice and proceeded to probate the will of Joe Wilson. He took no inventory of the property belonging to the estate of Joe Wilson for the reason Joe

Wilson owned no property and only expected to inherit the separate property of his deceased wife, Irma Turner Wilson, when he obtained a judgment of the court declaring her will to be null and void.

The Articles of our Code of Civil Procedure dealing with representatives include both executors and administrators. The duties of executors and administrators do not vary materially and therefore the same rules governing the conduct of administrators are applicable to executors. In *Kings v. Lastrapes*, 13 La. Ann. P. 582, it is said by the Court as follows: "In cases where the law makes it imperative upon the Judge ex-officio to appoint an executor, it does not dispense with the necessary informalities. An appointment made under such circumstances, should be made only after due notice to all interested parties. The Court went on to say that the appointment of a dative testamentary executor without notice of the application, is null. In *Pfarr, et al v. Blemont*, 1 So. 681, it was held that the appointment of a dative testamentary executor on the filing of a petition for same and before an advertisement and expiration of the delay for opposition, is unwarranted and that it could only be made after publication and in the absence of opposition.

It is said by Harold Chapple that no inventory is necessary for reason he is a testamentary executor and not governed by the rules applicable to administrators. Accordingly, he says that there is no necessity for taking an inventory. Even though he is a testamentary executor interested persons such as creditors could demand security under our Code of Civil Procedure Articles 3154 and 3155. If he is required to furnish security it is governed by Article 3151 and is

not to exceed the amount provided in said Article. Therefore, it appears than an inventory is a necessary part of any application to be appointed executor under a last will and testament, even though bond is not required by the testator.

Code of Civil Procedure Article 5251 defines "Legal Representative." In the definition as set out in said Article is included, "Executors." Article 194 of our Code of Civil Procedure authorized the Judge of the District Court, among other things, to sign orders directing the execution of testaments, orders confirming or appointing a legal representative, when unopposed. This necessarily means that the Court cannot issue these orders in Chambers when there is opposition to the application of the legal representative. The purpose for notice of an application to be appointed legal representative of a succession is to give the interested parties sufficient notice and time to file their opposition. This was done in the present case and the specific and clear provisions of Code of Civil Procedure Article 3093 have been violated.

Article 3093.

> When notice has been petitioned for as provided in Article 3091, the applicant for appointment as administrator shall mail or deliver to the person designated to receive such notice a copy of his application for appointment, and shall notify him of the date and hour assigned by the court for a hearing thereon.

3. Appellants motion for leave to amend their petition found on page forty-one (41) of the record was refused by the trial court. The Louisiana Courts have consistently allowed amendments to petitions that failed to state a right

or cause of action. *Reeves v. Globe Indemnity Company of New York*, 185 La. 42, 168 So. 488, *Douglas v. Haro et al*, 39 So. 2d 744, *Robinson v. Allen*, 88 So. 2d 64, *Bourgeois v. LeBlanc*, 72 So. 2d 777, *Federal Insurance Company v. T. L. James & Company*, 69 So. 2d 636, *Serio v. Chadwick*, 66 So. 2d 9, *Bourg v. J. Ray McDermott & Company*, 52 So. 2d 717, *Doyle v. Thompson*, 50 So. 2d 505. In *Lemoine v. Lacour*, 34 So. 2d 392, it was held that plaintiff, whose petition was insufficient, could amend it so as to state cause of action, if possible, and thereby prevent dismissal of suit. In the case of *Arceneaux v. Louisiana Highway Commission*, 5 So. 2d 20, the court held that amendment of petition after the filing of an exception of no right of action and no cause of action was proper. The court went on to say that a judgment maintaining an exception of no cause of action or no right of action based on insufficiency of allegations cannot form the basis of a plea of res judicata.

4. It is clear that under Code of Civil Procedure Articles 681 and 685 that appellants herein are possessed of the requisite interest to test the will of Joe Wilson. The cost of the litigation should be paid by the estate. Civil Code Article 1682, *Succession of Pizzati*, 75 So. 498, *Succession of McCan*, 21 So. 768, *John Close v. Charles Close*, 13 La. Ann. 590, *Sterlin's Executor v. Gros*, 5 La. 100, *Succession of Heffner*, 21 So. 905, and *Succession of Filhiol*, 49 So. 138. These cases represent the Louisiana Review for many years past.

It is clear that the Louisiana cases have consistently held that amendment to petitions should be allowed whenever possible to prevent dismissal of suit. It is equally clear under the cases and also Civil Code Article 1682 that the

Louisiana view of the matter of cost is that it should be paid by the estate. However, in this case appellants motion for leave to amend has been denied and all cost has been assessed against Samuel Emanuel individually. This ruling would seem to be arbitrary such as to deny appellants due process of law and equal protection of the law prohibited by the Fourteenth amendment to the Constitution of the United States giving this court jurisdiction, *New York and Queens Gas Co. v. McCall*, 38 S.Ct. 122, 245 U.S. 345.

We believe that Code of Civil Procedure Articles 681 and 3091 could not have been intended by the Legislature to mean as construed by the Court of Appeal in *Succession of Joe Wilson*, 210 So. 2d 602. These issues were presented to the Louisiana Supreme Court in our petition for Writ of Review, see page three (3) of petition of Writ of Review. In *Atlantic Coast Line R. Co. v. Phillips*, 67 S.Ct. 1584, 332 U.S. 168, this court said: "The United States Supreme Court should reject construction which the Georgia Supreme Court placed upon what Georgia Legislature of 1833 wrote only if United States Supreme Court could be confident that the Georgia Legislature of 1833, by the words it used could not have expressed the meaning thus attributed to it." In this case the Supreme Court of Louisiana simply denied petition for Writ of Review.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Further submit in the alternative that the papers herein submitted be treated as a petition for writ of certiorari as provided in 28 U.S.C. § 2103.

Respectfully submitted,

JAMES SHARP, JR.
Attorney at Law
105 North 23rd Street
P. O. Box 271
Monroe, Louisiana
Attorney for Appellants

PROOF OF SERVICE

I, James Sharp, Jr., Attorney for Samuel Emanuel and Mary Stewart Emanuel, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 26 day of February, 1969, I served a copy of the foregoing jurisdictional statement, and its appendices, on Harold Chapple, appellee in connection with this appeal, by mailing same to his counsel of record, Howell H. Heard, in the United States Mail, First Class, postage paid at his office at 415 Cypress Street, West Monroe, Louisiana.

James Sharp Jr.

JAMES SHARP, JR.

APPENDIX "A"

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

SUCCESSION OF
JOE WILSON
PROBATE DOCKET
NUMBER 78,866

FILED: Nov. 27, 1967
Charlotte McKnight
DEPUTY CLERK,
FOURTH DISTRICT COURT

JUDGMENT

Defendant, Harold Chapple, having filed an exception of no right or cause of action to the proceedings filed by Samuel Emanuel and Mary Stewart Emanuel, praying for the annullment of the will of Joe Wilson, and said exception having been set down for hearing, and taken up and heard, and the law and the evidence being in favor of the defendant, Harold Chapple, and against plaintiffs, Samuel Emanuel and Mary Stewart Emanuel, on the hearing of said exception, and the law and the evidence being in favor thereof.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Harold Chapple, Testamentary Executor of the Succession of Joe Wilson, and against plaintiffs, Samuel Emanuel, individually, and as testamentary executor and residuary

legatee in the Succession of Irma Turner Wilson, and Mary Stewart Emanuel, sustaining the exception of no right or cause of action filed by Harold Chapple and the demand in the suit filed by Samuel Emanuel and Mary Stewart Emanuel for the annullment of the will of Joe Wilson is rejected and dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Harold Chapple, Testamentary Executor of the Succession of Joe Wilson, and against said Samuel Emanuel, individually, and as testamentary executor and residuary legatee in the Succession of Irma Turner Wilson, and Mary Stewart Emanuel, in solido, ordering and condemning Samuel Emanuel, individually and as testamentary executor and residuary legatee in the Succession of Irma Turner Wilson, and Mary Stewart Emanuel, in solido to pay all costs of the suit and proceedings brought by Samuel Emanuel and Mary Stewart Emanuel for the annullment of the will of Joe Wilson.

Judgment rendered November 15, 1967.

Judgment read and signed in Open Court this 27th day of November, 1967.

/s/ Jesse Heard
JUDGE, FOURTH DISTRICT COURT

APPENDIX "B"

NO. 11,008

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

SUCCESSION
OF
JOE WILSON

Appeal from the Fourth Judicial District Court,
Parish of Ouachita, State of Louisiana.
Honorable Jesse S. Heard, Judge.

James Sharp, Jr. — Attorney for Plaintiffs-Appellants Samuel Emanuel and Mary Stewart Emanuel

Howell H. Heard — Attorney for Defendant-Appellee Harold Chapple

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BEFORE: AYRES, BOLIN & STEPHENS, JJ.

By Bolin, J.

Joe Wilson died on September 20, 1967. By his purported will he named Harold Chapple as his testamentary executor, without bond, and universal legatee. Wilson's wife,

Irma Turner Wilson, predeceased him and allegedly, by her will, appointed Samuel Emanuel as executor and residuary legatee, and named Mary Stewart Emanuel as special legatee. Five days after the death of Joe Wilson, and prior to any succession proceedings, Samuel Emanuel filed a petition requesting that he be given notice of the filing of an application for appointment of an administrator. The next day (September 26, 1967) a nuncupative will by private act of Wilson was duly admitted to probate and Harold Chapple was confirmed as testamentary executor without any notice being given to Emanuel.

The instant proceeding was filed by Samuel Emanuel seeking a rule to show cause why Chapple should not be removed as executor since the requested notice was not given. Subsequently, Samuel Emanuel, joined by Mary Stewart Emanuel, petitioned the court to set aside and annul the will of Joe Wilson because of alleged defects therein. The lower court sustained an exception of no cause or right of action against the request to annul the will on the ground the Emanuels had failed to allege they were heirs who would be entitled to inherit in the Succession of Joe Wilson in the absence of a will or if the will was declared null and void.

On the merits of the issue of the necessity of giving notice for the appointment of an administrator the lower court decided the provision of La.C.C.P. 3091, requiring notice of application for appointment as administrator, applied to appointment of administrators in intestate successions and not to the confirmation of testamentary executors. From these two rulings the Emanuels appeal. Chapple answers the appeal and objects to the wording of the judgments designating Samuel Emanuel as residuary legatee and testamentary ex-

ecutor of the estate of Irma Turner Wilson, particularly as it relates to the costs to be paid in such representative capacity.

The appeal presents two issues:

(1) Do parties who do not allege they are heirs of a decedent entitled to inherit in the absence of a will have a right to institute proceedings to annul the will?

(2) Where a party files a petition under La.C.C.P. 3091 within ten days of the death of the deceased entitling him to notice before the appointment of an administrator, does this include the right to be notified in the case of the confirmation of a testamentary executor?

Giving consideration to the issues in the order state we think the lower court correctly held the Emanuels did not have a right or cause of action to contest the validity of the will of Joe Wilson. La.C.C.P. Article 681 provides:

> "Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts."

In *Succession of Ludovic J. Vicknair and Marie Vempren, his Wife*, 126 So.2d 680 (La.App. 4 Cir. 1961 cert. den.), it was held:

> "At the outset we must notice ex-officio that petitioners Arille Vicknair, Lionel Vicknair, Mrs. Bluette Vicknair Messina and Arsene Vicknair Duhe, the brothers and sister of Ludovic J. Vicknair, have no right to prosecute

the suit and stand in judgment thereon for the reason that they are not heirs at law of said decedent.

"The inventory shows all property left by Mr. and Mrs. Vicknair to be assets of the community of acquets and gains which existed between them. They left neither children, other descendants, nor ascendants, and adopted no one. Therefore, under Art. 915, LSA-C.C., if Ludovic J. Vicknair's will and testament were to be annulled and he declared to have died intestate, his surviving wife, now herself deceased, would be adjudged to have inherited his undisposed of share of the community property in full ownership and the property so inherited would now belong to her estate. Said petitioners have no interest to seek the annulment of Ludovic J. Vicknair's will as its nullity would avail them nothing and they must be eliminated from the case. An action can be brought only by a person having a real and actual interest which he asserts. C.P.art.15; LSA-C.C.P. art. 681. In Dazie v. Wainwright, La. App., 81 So.2d 96, 97, . . ."

Nowhere in plaintiffs' petition do they allege they are the heirs of Joe Wilson. Should the will of Joe Wilson be declared null the property owned by Joe Wilson could not be inherited by plaintiffs and the fact that they state the will of Joe Wilson disposed of property belonging to the Succession of Irma Turner Wilson, contrary to the interests of petitioners, does not give them, nor does it state that it gives them, an interest in the Succession of Joe Wilson. (1) Whether his will is valid or invalid Joe Wilson could not dispose of property he did not own. Therefore, we conclude the lower court correctly sustained the exception of no cause or right of action.

On the merits of the motion, plaintiffs allege under Article 3091 of the Code of Civil Procedure they were en-

titled to notice before appointment of an administrator in the Succession of Joe Wilson. Article 3091 provides:

> "An interested person desiring to be notified of the filing of an application for appointment as administrator, at any time after the death of the deceased, may petition the court in which the succession has been opened, or may be opened, for such notice.
>
> "A petition for such notice shall comply with Article 3092, shall bear the number and caption of the succession proceeding, and shall be docketed and filed by the clerk in the record thereof.
>
> "When a petition for such notice has been filed within ten days of the death of the deceased, or prior to the application for appointment as administrator, the applicant for appointment shall serve the notice prayed for, as provided in Article 3093."

Appellants further contend the lower court erred in failing to comply with the procedural provisions of La.C.C.P. 3094:

> "The court shall order the taking of an inventory, or the filing of a descriptive list as provided in Article 3136, of the property of the deceased upon the filing of an application for appointment as administrator.
>
> "If notice of the application for appointment is required under Articles 3091 through 3093, the court shall assign a date and hour for a hearing on the application, which shall be held not earlier than the eleventh day after the mailing or delivery of such notice. If no such notice is required, and ten days have elapsed since the death of the deceased, the court may appoint the applicant as administrator forthwith, unless he is disqualified under Article 3097."

Plaintiffs point out that Article 3182 of the Code of Civil Procedure provides:

> "The court may remove any succession representative who . . . has failed to give notice of his application for appointment when required under Article 3093.
>
> "The court on its own motion may, and on motion of any interested party shall, order the succession representative sought to be removed to show cause why he should not be removed from office. The removal of a succession representative from office does not invalidate any of his official acts performed prior to his removal."

They urge, in view of the articles quoted above, the court should have rendered judgment removing Harold Chapple as testamentary executor of the Succession of Joe Wilson.

We note that Articles 3091, 3092, 3093 and 3094, relied upon by appellants, are found in Section 2 of Title III of Book VI, Code of Civil Procedure, applying to administrators. In the present case Harold Chapple is a testamentary executor of the Succession of Joe Wilson and, as such, is governed by the provisions of articles dealing with executors which are found in Section 1 of the title and book referred to above. Article 3081 of the Code of Civil Procedure provides for the confirmation of executors. This article states:

> "After the probate of the testament, or after its production into court as provided by Article 2891 if it is a nuncupative testament by public act, the person named as executor therein may petition the court for confirmation, and for the issuance of letters testamentary. If he files the original petition for the execution of the testament, he may pray therein for the issuance of letters."

We have been cited to no codal article or statute requiring a testamentary executor to give notice before filing a will for probate. We conclude the judgment of the lower court was correct on this issue as well as that previously discussed.

With reference to the answer of Chapple objecting to the wording of the judgments designating Samuel Emanuel as testamentary executor and residuary legatee under the will of Irma Turner Wilson we find the record is devoid of evidence attesting to the qualifications of Samuel Emanuel as testamentary executor of the Succession of Irma Turner Wilson or that such succession should be held liable for costs of these proceedings.

For the reasons assigned the judgments appealed from are amended to eliminate the designation of Samuel Emanuel as testamentary executor and residuary legatee in that portion of the judgments assessing costs against him in his representative capacity.

As amended, the judgments appealed from are affirmed at appellants' costs.

APPENDIX "C"

SUPREME COURT OF LOUISIANA
New Orleans, 70112

No. 49,369 October 3, 1968

SUCCESSION OF JOE WILSON

In re: Samuel Emanuel applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Ouachita

---

Writ refused. The result is correct.

/s/ EHMcC
/s/ JBF
/s/ WBH
/s/ JWS
/s/ FWS
/s/ MEB

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
October 3, 1968

Harold A. Moise, Jr.
Deputy Clerk

APPENDIX "D"

Code of Civil Procedure Article 681. Real and actual interest required.

Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

APPENDIX "E"

Civil Code Article 924. Inheritance rights between spouses.

If a married man has left no lawful descendants nor ascendants, nor any collateral relations, but a surviving wife not separated from bed and board from him, the wife shall inherit from him to the exclusion of any natural child or children duly acknowledged.

If, on the contrary, it is the wife who died without leaving any lawful descendants, ascendants, or collateral relations, her surviving husband not separated from bed and board from her, shall not inherit from her, except in case she should leave no natural child or children by her duly acknowledged.

APPENDIX "F"

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

SUCCESSION OF	()	FILED: Feb. 8, 1968
IRMA TURNER WILSON	()	
PROBATE DOCKET	()	DEPUTY CLERK,
NUMBER 76,119	()	FOURTH DISTRICT COURT

JUDGMENT

This cause having been regularly filed and served, set down for trial on answers filed by defendants, taken up and heard on trial, and judgment having been rendered January 10, 1968, and judgment read and signed January 10, 1968, and motion for new trial having been filed by plaintiff, Harold Chapple, and by defendants, Samuel Emanuel and Mary Stewart Emanuel, and new trial having been granted only for the purpose of correcting said judgment signed January 10, 1968, by making provisions for payment of Court costs, and having been set down for hearing on new trial, and taken up and heard on new trial, and the law and the evidence being in favor thereof;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Harold Chapple, as Testamentary Executor of the Succession of Joe Wilson and against defendants, Mary Stewart

Emanuel, Judge G. Claiborne, and Samuel Emanuel, individually and as Testamentary Executor of the Succession of Irma Turner Wilson, declaring the purported will of Irma Turner Wilson Stewart (later named "Irma Turner Wilson") dated July 7, 1960, and probated in these proceedings by order of probate of this Court dated October 27, 1966, to be null and void, and rescinding and recalling said order of probate of said purported will dated October 27, 1966, in these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fee of Gilbert T. Brown, Jr., as Curator Ad Hoc for Judge G. Claiborne be and the same is fixed at the amount of Two Hundred Fifty and no/100 ($250.00) dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay all costs.

Judgment on rehearing rendered in Open Court February 7, 1968.

Judgment on rehearing read and signed in Open Court February 8, 1968.

/s/ Jesse Heard

JUDGE, FOURTH DISTRICT COURT

APPENDIX "G"

Code of Civil Procedure Article 3091. Petition for notice of application for appointment.

An interested person desiring to be notified of the filing of an application for appointment as administrator, at any time after the death of the deceased, may petition the court in which the succession has been opened, or may be opened, for such notice.

A petition for such notice shall comply with Article 3092, shall bear the number and caption of the succession proceedings, and shall be docketed and filed by the clerk in the record thereof.

When a petition for such notice has been filed within ten days the death of the deceased, or prior to the application for appointment as administrator, the applicant for appointment shall serve the notice prayed for, as provided in Article 3093.

APPENDIX "H"

STATE OF LOUISIANA
PARISH OF OUACHITA

BEFORE ME, BILLYE L. ADAMS, Notary Public for the Parish of Ouachita, duly commissioned and qualified, and in the presence of MARY VIRGINIA RAWLS and MORRIS A. NORWOOD, JR., competent witnesses, residing in the Parish of Ouachita, State of Louisiana, personally came and appeared IRMA TURNER STEWART, a resident of the Parish of Ouachita, State of Louisiana, who declared to me, Notary, in the presence of the aforesaid and undersigned witnesses, and that she wished to make her last will and testament, and she, the said IRMA TURNER STEWART, Testatrix, declared the hereinafter expressed provisions to be her last will and testament, revoking all others, in words as follows, to-wit:

I, IRMA TURNER STEWART, being of sound mind and knowing that life is precarious and wishing to make proper disposition of my property in case of my death, in the presence of the aforesaid Notary and witnesses, do declare this my last will and testament:

I desire that all my just debts be paid

I will and bequeath to JUDGE G. CLAIBORNE, MARY STEWART EMANUEL and SAMUEL EMANUEL all of the

property, real, personal and mixed, of which I die possessed, to be divided as follows:.

TO JUDGE G. CLAIBORNE: The Northeast Quarter of the Northeast Quarter (NE ¼ of the NE ¼) of Section 12, Township 17 North, Range 1 East, situated in Ouachita Parish, Louisiana.

/s/ Irma Turner Stewart
IRMA TURNER STEWART

TO MARY STEWART EMANUEL: The Southeast Quarter of the Northeast Quarter (SE ¼ of the NE ¼) of Section 12, Township 17 North, Range 1 East, situated in Ouachita Parish, Louisiana.

TO SAMUEL EMANUEL: All of the property of which I die possessed, less and except that given and bequeathed to JUDGE G. CLAIBORNE and MARY STEWART EMANUEL.

I constitute and appoint SAMUEL EMANUEL, Executor of my Succession, with full seisin and dispense him from the obligation of giving bond.

I declare this to be my last will and testament on this the 7th day of July, 1960.

/s/ Irma Turner Stewart
IRMA TURNER STEWART

Signed (on each page) and declared by IRMA TURNER STEWART, in our presence to be the last will and testament

and in the presence of the Testatrix, IRMA TURNER STEWART, and each other, we have hereunto subscribed our names on this the 7th day of July, 1960.

WITNESSES:

/s/ Mary Virginia Rawls
MARY VIRGINIA RAWLS

/s/ Morris A. Norwood, Jr.
MORRIS A. NORWOOD, JR.

In testimony whereof, the said IRMA TURNER STEWART, Testatrix hereto, signs, together with me, the said Notary and the witnesses aforesaid on the 7th day of July, 1960.

/s/ Billye L. Adams
NOTARY PUBLIC

APPENDIX "I"

STATE OF LOUISIANA
PARISH OF OUACHITA

I, Joe Wilson, now a resident of Ouachita Parish, Louisiana, being of sound mind, do hereby make this my last will and testament.

I will and bequeath to Harold Chapple, who now resides in Ward Six of Ouachita Parish, Louisiana, all the property of every kind and nature that I may own at the time of my death, including with all other property I then own (or have a right to claim) the right to accept the Succession of my deceased wife, Irma Stewart Wilson, and to have and own all the property left by my deceased wife Irma Stewart Wilson.

I name and appoint Harold Chapple the executor of this my last will and testament and give him possession of my estate from the time of my death and dispense him from giving bond as administrator.

In testimony whereof I have caused this will to be written out of the presence of the hereinafter named witnesses and said will was read aloud by Howell H. Heard, one of said witnesses to the remaining witnesses, and in my presence, and I presented this will to said witnesses namely, Howell H. Heard, Jasper L. Scott, Myles Scott, Carl Lee Harris, Waymon G. Small, Willie Woodard and Sam Hatter, all residents

of Ouachita Parish, Louisiana, and I declared to them said witnesses that this is my last will and testament, and being unable to sign my name by writing it out, I make my mark on this will as my signature on this 19 day of October, 1966.

his
/s/ Joe X Wilson
mark
JOE WILSON

Witness:

/s/ Howell H. Heard
HOWELL H. HEARD

/s/ Jasper L. Scott
JASPER L. SCOTT

/s/ Myles Scott
MYLES SCOTT

/s/ Carl L. Harris
CARL L. HARRIS

/s/ Waymon G. Small
WAYMON G. SMALL

/s/ Willie Woodard
WILLIE WOODARD

/s/ Sam Hatten
SAM HATTEN

SUPREME COURT, U. S.

MAR 24 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 1092

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

HOWELL H. HEARD
415 Cypress Street
P. O. Box 365
West Monroe, Louisiana
Attorney for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 1092

SAMUEL EMANUEL, INDIVIDUALLY AND AS TESTAMENTARY EXECUTOR AND RESIDUARY LEGATEE OF THE SUCCESSION OF IRMA TURNER WILSON AND MARY STEWART EMANUEL,

Appellants,

versus

HAROLD CHAPPLE, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JOE WILSON,

Appellee.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS APPEAL

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. No Federal question was raised or passed on in any State Court.

2. The appeal does not present a substantial Federal question.

3. The judgment rests on an adequate non-federal basis.

STATEMENT

Joe Wilson died on September 20, 1967 (R. 9). On September 25, 1967, Samuel Emanuel filed a petition praying that a notice of the filing of an application for appointment as administrator of the Succession of Joe Wilson be sent to James Sharp, Jr., Attorney for Samuel Emanuel (R. 5-6). On September 26, 1967, on the petition of Harold Chapple, who was named testamentary executor in the will of Joe Wilson, the State District Court admitted the will of Joe Wilson to probate (R. 11-12) and confirmed Harold Chapple as testamentary executor of the Succession of Joe Wilson (R. 13). The will of Joe Wilson, in the record at page 26, is the form of a nuncupative testament under private signature, as authorized by Articles 1581 and 1582 of the Civil Code of Louisiana (Appendices "A" and "B', infra). No defect in form or a manner of execution appears in the will. On October 2, 1967, appellant Samuel Emanuel filed a motion to remove Harold Chapple as testamentary executor because of failure to give prior notice of his application for appointment

(R. 16-18). On October 4, 1967, Samuel Emanuel and Mary Stewart Emanuel filed a petition praying for the annulment of the will of Joe Wilson (R. 19-21), and on October 5, 1967, the same plaintiffs filed a supplemental petition amending their petition of October 4, 1967, to add an allegation that in his will Joe Wilson proposes to dispose of property belonging to the Succession of Irma Turner Wilson contrary to the interests of plaintiffs as plaintiffs have been made legatees under the will of Irma Turner Wilson and bequeath the property attempted to be disposed of in the will of Joe Wilson (R. 24-26). On October 11, 1967, appellee Harold Chapple filed a peremptory exception of no right or cause of action to the suit to declare the will of Joe Wilson a nullity on the ground that plaintiffs (appellants) do not allege themselves to be heirs of Joe Wilson or have a right to receive any inheritance or legacy in the Succession of Joe Wilson in the event the will should be annulled (R. 32-33). On November 6, 1967, appellee Harold Chapple filed a peremptory exception to the motion to remove Harold Chapple as testamentary executor of the Succession of Joe Wilson for similiar reasons of lack of interest in appellants to bring the proceedings (R. 37-38). On November 6, 1967, appellee Harold Chapple filed an answer to the motion to remove him as testamentary executor of the Succession of Joe Wilson (R. 39-40). On November 7, 1967, the State District Court heard both the exceptions in the case and heard the motion

to remove Harold Chapple on the merits (R. 1-2). On November 15, 1967, the State District Court, assigning written reasons for judgment (R. 50-55), sustained the exception of no cause or right of action to the petition for the nullity of the will of Joe Wilson and overruled the motion to remove Harold Chapple as testamentary executor of the Succession of Joe Wilson (R. 2). After the decision by the State District Court and on the same day of the decision, appellants Samuel Emanuel and Mary Stewart Emanuel filed a motion to amend their petition, but did not show in the motion any additional facts to be pleaded by them in the proposed amended petition (R. 41). After hearing a motion for a new trial filed by Samuel Emanuel (R. 43-44), the State District Court on November 21, 1967, overruled both the motion for new trial and motion to amend which had been filed by appellants (R. 3). On November 27, 1967, the State District Court signed a judgment rejecting the motion for the removal of Harold Chapple as testamentary executor (R. 55) and a judgment sustaining the peremptory exception of no right or cause of action to the suit for the nullity of the will of Joe Wilson (R. 56). Appellants appealed to the Court of Appeal Second Circuit of Louisiana where appellee Harold Chapple answered objecting to the judgment against Samuel Emanuel insofar as it was against him in his purported and alleged capacity as residuary legatee and testamentary executor of the

Succession of Irma Turner Wilson (R. 64-65), and the State Court of Appeal amended the judgment of the State District Court to eliminate the designation of Samuel Emanuel as testamentary executor and residuary legatee, and as amended, affirmed the judgments of the State District Court. The decision of the State Court of Appeal is reported at 210 So. 2d 602, and is quoted in full in Appendix "B" of appellants' brief in this Court. Appellants applied to the Supreme Court of Louisiana for certiorari or writ of review and the Supreme Court of Louisiana refused the writ, saying "The result is correct." The decision of the Supreme Court of Louisiana is reported at 214 So. 2d 162, and appears as Appendix "C" in appellants' brief in this Court. Appellants did not at any time in any of the three State Courts plead or argue or in any other manner raise any question arising under the Federal Constitution or Statutes. None of the opinions of the three State Courts mentions, discusses or otherwise passes upon any question arising under the Federal Constitution or Statues. In the State Courts, appellants did not challenge the validity of any State statute at any time. The sole basis for the decisions of the State Courts was a construction of State laws and application of State laws to the facts of this case.

QUESTIONS PRESENTED

1. Where appellants have not raised in the State

Court any question concerning the validity of any State statutes on the ground of the repugnancy to the Constitution, treaties or laws of the United States, and the opinions, judgements and orders of the State Courts do not mention, discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court of the United States attach on appeal from a judgment of a State Court dismissing the suit of plaintiffs for lack of interest of plaintiffs to sue for the nullity of a probated will, and a judgment of a State Court refusing to remove a testamentary executor appointed by the State Court?

2. Where a State statute provides that an action be brought only by a person having a real and actual interest which he asserts, and a State Court interprets the State statute as denying to parties seeking to annul a probated will the right to attack such will unless they would benefit as heir or legatee of the deceased in the absence of such will, but the constitutional validity of the State statute is not challenged, is there a substantial Federal question involved?

3. Where the State Courts interpret State procedural statutes as authorizing the appointment and confirmation of a testamentary executor named in a will upon probate of the will and prior to notice to anyone, but the constitutional validity of the statute is not challenged, is there a substantial Federal question involved?

4. Where the judgement of the State Court appealed from is based upon reasonable interpretations of a State statute requiring that a person suing to annul a probated will have a real and actual interest, and a State statute authorizing the appointment and confirmation of a testamentary excutor upon probate of a will and prior to notice to anyone, and the judgment not involving any question under the Constitution or laws of the United States, does the judgment rest on an adequate non-federal basis?

ARGUMENT

1. NO FEDERAL QUESTION WAS RAISED OR PASSED ON IN ANY STATE COURT.

The Courts of Louisiana will inquire into the question of whether any State statute is unconstitutional as a violation of the Federal Constitution. *State v. Birdsell,* 235 La. 396, 104 So. 2d 148 (1958), Supreme Court of Louisiana. However, the courts of Louisiana follow the rule that he who urges the unconstitutionality of a law must specially plead its unconstitutionality and show specifically where it is unconstitutional; and that an argument of unconstitutionality which is not raised by the pleadings is not properly before the State Court and cannot be considered on appeal to the State appellate courts. *State v. Great Atlantic & Pacific Tea Co.,* 190 La. 925, 183 So. 219 (1938), Supreme Court of Lousiana, certiorari denied *Great Atlantic & Pacific Tea Co. v. State of Louisi-*

ana, 305 U. S. 637, 59 S. Ct. 108, 83 L. Ed. 410 (1938).

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a State court, it must appear that there were Federal questions involved which were raised in the State Courts at the proper time. Supreme Court of the United States Rules 15 1(d) and 16 1(b); *Edelman v. People of State California,* 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953); *Hulbert v. Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906). The statute authorizing appeal to the Supreme Court of the United States, 28 U. S. Code 1257(2) requires as a basis for such appeal that there be drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision of the State court be in favor of its validity.

Appellants have not pleaded, argued, or raised in any manner the question of the validity of any State statute on the ground if its being repugnant to the Constitution treaties or laws of the United States, and there has been no ruling of any State court pertaining to such a question. The Supreme Court of the United States has also ruled that certiorari is not available for review of a State court judgment where there has been no Federal question raised or presented to the State court for decision. *Newsom v. Smyth,* 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803

(1961); *Ellis v. Dixson,* 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 (1955); *Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741 (1945). The statute providing for writ of certiorari is 28 U. S. Code 1257(3). This case is not within the scope of that statute.

2. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

In jurisdictional statement filed in this Court, appellants attached exhibits which are not a part of the record in this case in the State Court, namely, Appendix "F", which is the judgment in the Succession of Irma Turner Wilson, Number 76,119 on the Probate Docket of the State District Court, and Appendix "H", which is the will of Irma Turner Wilson, the predeceased wife of Joe Wilson.

Also, in jurisdictional statement filed in this Court, appellants make a number of assertions which are not supported by the record in this case, namely, the following:

A. Page 4 of jurisdictional statement. That Joe Wilson died during the pendency of his proceedings wherein he attacked the will of Irma Turner Wilson. Also, that after qualifying as testamentary executor under the purported will of Joe Wilson, Harold Chapple caused himself to be substituted and appoint-

ed plaintiff in lieu of Joe Wilson in the Succession of Irma Turner Wilson, Number 76,119 on the Probate Docket of the State District Court, and continued the attack upon the will of the said Irma Turner Wilson.

B. Page 5 of jurisdictional statement. That the Trial Court had refused to qualify Samuel Emanuel as testamentary executor of the Succession of Irma Turner Wilson. Also, that appellants would inherit the property of the Succession of Irma Turner Wilson were it not for the will in these proceedings.

C. Page 6 of jurisdictional statement. That Joe Wilson claims that Irma Turner Wilson left no descendants, ascendants, collateral relations or natural child or children by her duly acknowledged and that he would inherit her estate under Civil Code Article 924. Also, that Joe Wilson seeks to declare the will of Irma Turner Wilson null and void because he would not inherit her separate estate in the absence of any such will. Also, that Joe Wilson left no ascendants, descendants, collateral relations or natural child or children duly acknowledged; and but for his will there could be no substitution of party plaintiff in the Succession of Irma Turner Wilson.

If these assertions made by appellants in jurisdictional statement in the Supreme Court of the United

States add any additional issues whatever, which is questionable, they should not be considered by the Supreme Court of the United States for the reason that this subject matter was not presented by a pleading or evidence to the State Courts and there has been no issue in this case with reference to such subject matter. Appellants should not be permitted to form new issues at this time by making such assertions. Appellee objects to appellants attaching Appendices "F" and "H" to jurisdictional statment. Appellee also objects to and does not admit the correctness of the remaining assertions and conclusions shown above which are not supported by pleadings or evidence in the record. The State Courts decided the case on the basis of the record before it. The decision of the State Court should be judged by the Supreme Court of the United States on the basis of what the Court properly had before it in proceedings in the State Court. *Carter v. People of State of Illinois,* 329 U. S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946). Appellants did not at any time offer or request leave to plead the above assertions as pleadings in the State Courts.

None of the questions raised by appellants in jurisdictional statement is a Federal question. All are questions of interpretation of State statutes. The opinions of the State Courts show ample support for their decisions. The interpretations of the State statutes are reasonable and logical interpretations. The Supreme Court of the United

States accepts and is bound by the construction given to State statutes by the State Courts. *U. S. v. Burnison,* 339 U. S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947).

The ruling of the State Court in this case interpreting Article 681 of the Code of Civil procedure of Louisiana (Appendix "C", infra) as requiring a party who is attacking the validity of a will to have an interest such that if the will is set aside, he will inherit in the absence of the will, is the same as similar interpretations placed upon similar statutes by the United States Court of Appeals, District of Columbia Circuit, in *Kimberland v. Kimberland,* 204 F. 2d 38 (1953); and by the California District Court of Appeal, Second District, in *Re Bily's Estate,* 96 Cal App2d 333, 215 P2d 78, 15 ALR2d 861 (1950). The decision of the State Court in this case is supported by *Succession of Vicknair,* 126 So. 2d 680 (1951), decided by the Court of Appeal of Louisiana, Fourth Circuit, and certiorari denied by the Supreme Court of Louisiana; and *Succession of Israel,* 146 So. 2d 53 (1962), decided by the Court of Appeal of Louisiana, Fourth Circuit, certiorari denied by the Supreme Court of Louisiana.

The ruling of the State Court that a testamentary executor named in the will of decedent is entitled to qualify without notice to anyone is a reasonable interpre-

tation of the statutory provisions of the Code of Civil procedure of Louisiana, adopted in 1961. Cases cited by appellants in jurisdictional statement decided prior to 1961, and not involving testamentary executors named in the will of the decedent are not applicable.

The State District Court's denial of appellants' motion for leave to amend, made by appellants after the State District Court had sustained the peremptory exception of no cause or right of action and dismissed the suit of appellants was in accordance with State law. In making the motion, appellants did not offer or indicate any intention of pleading any facts which would be additional to the facts pleaded in their original petition and in their supplemental and amended petition which had been filed. Article 934 of the Code of Civil Procedure of Louisiana, (Appendix "D", infra) effective January 1, 1961, was applied in a similar manner by the Court of Appeal of Louisiana, Fourth Circuit, in *Tripod Boats, Inc. v George Engine Co.*, 170 So. 2d 238 (1965).

There being no evidence whatever in the record to show Samuel Emanuel was qualified as testamentary executor or residuary legatee in the Succession of Irma Turner Wilson, it was entirley reasonable for the State Court of Appeal to eliminate the designation of Samuel Emanuel as having such capacities in that portion of the judgment assessing costs against him.

3. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

As shown above, the judgment of the State Court rests entirely upon a reasonable interpretation of State statutes.

CONCLUSION

For the foregoing reasons, appellee moves that this appeal be dismissed, and that the alternate prayer of appellants that the papers submitted as a jurisdictional statement be treated as a petition for writ of certiorari be denied.

HOWELL H. HEARD
Attorney at Law
415 Cypress Street
P. O. Box 365
West Monroe, Louisiana
Attorney for Appellee

PROOF OF SERVICE

I, Howell H. Heard, Attorney for Appellee herein, a member of the Bar of the Supreme Court of the United States, herby certify that on this the 24 day of March, 1969, I served a copy of the foregoing motion to dismiss on appellants, Samuel Emanuel and Mary Stewart Emanuel, by depositing the same in a United States post office, with first class postage prepaid, addressed to James Sharp, Jr., Attorney at Law, 105 North 23rd Street, P. O. Box 271, Monroe, Louisiana, who is counsel of record for appellants.

Howell H. Heard

HOWELL H. HEARD
Attorney for Appellee

APPENDIX "A"

Civil Code of Louisiana Article 1581

A nuncupative testament, under private signature, must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place.

Or it will suffice, if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that that paper contains his last will.

APPENDIX "B"

Civil Code of Louisiana Article 1582

In either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator; it must be signed by the testator, if he knows how or is able to sign, and by the witnesses or at least by two of them, in case the others know not how to sign, and those of the witnesses who do not know how to sign, must affix their mark.

This testament is subject to no other formality than those prescribed by this and the preceding article.

APPENDIX "C"

Code of Civil Procedure of Louisiana Article 681. Real and actual interest required.

Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

APPENDIX "D"

Code of Civil Procedure of Louisiana Article 934. Effect of sustaining peremptory exception.

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

EMANUEL ET AL. *v.* CHAPPLE, TESTAMENTARY EXECUTOR.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 1092. Decided April 21, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.